



# CIRSA 101 – Real-Life Risk Management

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## Liability Risks Under the Laws of Transparency

Presented by Sam Light, CIRSA General Counsel

# Introduction

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- Transparency is a basic expectation for public entities.
- Citizens take interest in the goings-on of your organization; how/when those goings-on are discussed; the opportunities afforded to them to listen in on/participate in those discussions, and how/where they can access related information.
- A lack of transparency can cause massive trust and credibility issues, and potential claims/disputes over compliance.
- In this webinar, we'll explore three common risk areas under the laws of transparency: Notice requirements, the conduct of executive sessions, and First Amendment issues surrounding the conduct of public meetings.

# Take Notice: Give Notice!

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- Whether for public meetings, public hearings, or administrative proceedings, proper notice is important. And the perils of improper notice cannot be understated. Improper notice can result in:
  - Claims of violation of state statutes and/or local ordinances.
  - Claims of violation of constitutionally-protected rights.
  - Invalidation of the action taken.
  - An award of attorney's fees and costs to the claimant.

# OML - Notice Requirements

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- The Open Meetings Law (OML) requires “full and timely” advance notice to the public of any meeting of a “local public body.”
  - Notice must be posted at least 24 hours in advance (your local rules may set a stricter requirement).
  - Applies to any meeting where a majority or quorum will be present, or any formal action will be taken. This is in addition to the “openness” requirement of the OML.
  - The notice must include specific agenda information where possible.

# Quasi-Judicial Notice Requirements

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- In addition to general meeting notice under the OML, be certain to satisfy all notice requirements for “quasi-judicial” matters.
  - These often include additional requirements for notice by mail, publication, and/or posting at the property.
  - Commonly required for many types of licensing and land use proceedings (new liquor license, rezoning, subdivision, etc.)
- Proper notice of a quasi-judicial matter is often characterized as a “jurisdictional” requirement, with strict compliance generally required.
- In certain situations, a failure to give proper notice can be the basis of a civil rights money damages claim.

# Quasi-Judicial Notice Requirements



## CITY OF WORTHINGTON PLANNING COMMISSION NOTICE OF PUBLIC HEARING

The City of Worthington Planning Commission will hold two public hearings on Tuesday, October 3, 2017, for the purpose of considering the following business:

**Conditional Use Permit.** Southwest Minnesota Opportunity Council is seeking the issuance of a conditional use permit for property owned by Worthington ISD #918, located on Pleasant Avenue. If approved, the applicant will be permitted to operate a child care facility on the subject property. The applicant is proposing to construct a facility, up to 14,000 square feet. Child Care facilities are permitted in the "R-1" - Single Family Detached zoning district, which is the zoning classification of the subject property, through the issuance of a conditional use permit. The legal description of the subject property is as follows:

PART OF THE SOUTHEAST QUARTER OF SECTION 27, TOWNSHIP 102 NORTH, RANGE 40 WEST IN THE CITY OF WORTHINGTON, WORTHINGTON TOWNSHIP, NOBLES COUNTY, MINNESOTA, DESCRIBED AS FOLLOWS:

COMMENCING AT AN EXISTING IRON MONUMENT AT THE MOST NORTHERLY CORNER OF LOT 5, BLOCK 20 OF THE RECORDED PLAT OF BLOCKS 18, 19, AND 20, LUDLOW ACRES, CITY OF WORTHINGTON; THENCE NORTH 00 DEGREES 33 MINUTES 43 SECONDS WEST, ALONG THE WEST RIGHT OF WAY LINE OF PLEASANT AVENUE, A DISTANCE OF 224.60 FEET, TO THE POINT OF BEGINNING; THENCE CONTINUING NORTH 00 DEGREES 33 MINUTES 43 SECONDS WEST, ALONG SAID WEST RIGHT OF WAY LINE, A DISTANCE OF 241.20 FEET; THENCE SOUTH 69 DEGREES 57 MINUTES 54 SECONDS WEST, A DISTANCE OF 45.10 FEET; THENCE SOUTH 89 DEGREES 06 MINUTES 17 SECONDS WEST, A DISTANCE OF 173.72 FEET; THENCE NORTH 00 DEGREES 33 MINUTES 43 SECONDS WEST, PARALLEL WITH THE WEST RIGHT OF WAY LINE OF PLEASANT AVENUE, A DISTANCE OF 89.10 FEET; THENCE SOUTH 59 DEGREES 44 MINUTES 43 SECONDS WEST, A DISTANCE OF 242.89 FEET; THENCE SOUTH 00 DEGREES 33 MINUTES 43 SECONDS EAST, PARALLEL WITH THE WEST RIGHT OF WAY LINE OF PLEASANT AVENUE, A DISTANCE OF 345.40 FEET; THENCE NORTH 89 DEGREES 26 MINUTES 17 SECONDS EAST, A DISTANCE OF 427.15 FEET TO THE POINT OF BEGINNING.

**Conditional Use Permit.** Worthington ISD #518 is seeking to amend their Conditional Use Permit to remove two tracts from their original CUP which will reflect parts that have been or are to be developed differently from the original CUP. The Zoning in this District is R<sup>2</sup>-1<sup>1</sup> - Single Family Detached. The legal description of the subject property under consideration is as follows:

That part of the SE¼ of Section 27-T102N-R40W, City of Worthington, Nobles County, Minnesota, described as follows:

Beginning at the south quarter corner of said Section 27; thence on an assumed bearing of North 0 degrees 05 minutes 39 seconds West, along the north-south quarter line of said Section, a distance of 210.00' to the southwest corner of Block 1, Country Village Apartments Subdivision; thence North 86 degrees 38 minutes 33 seconds East, along the south line of said Block 1, a distance of 230.37' to the southeast corner of said Block 1; thence North 0 degrees 05 minutes 39 seconds West, along the east line of said Block 1, a distance of 753.82' to the northeast corner of said Block 1; thence South 89 degrees 56 minutes 31 seconds West, along the north line of said Block 1, a distance of 230.00' to the northwest corner of said Block 1; thence North 0 degrees 05 minutes 39 seconds West, along the north-south quarter line of said Section, a distance of 35.00'; thence North 89 degrees 56 minutes 31 seconds East, a distance of 230.00'; thence North 0 degrees 05 minutes 39 seconds West, a distance of 150.00'; thence South 89 degrees 56 minutes 31 seconds West, a distance of 230.00' to the north-south quarter line of said Section; thence North 0 degrees 05 minutes 39 seconds West, along the north-south quarter line of said Section, a distance of 670.50' to the southwest corner of Auditor's Plat, Block 7 of Ludlow Acres; thence South 75 degrees 46 minutes 13 seconds East, along the southerly line of said Auditor's Plat, Block 7 of Ludlow Acres, a distance of 131.80' to the southeast corner of Lot 12 of said Auditor's Plat, Block 7 of Ludlow Acres; thence easterly, along the southerly line of said Auditor's Plat, Block 7 of Ludlow Acres, on a curve concave to the north, having a radius of 777.94', a central angle of 20 degrees 26 minutes 19 seconds, the chord of said curve bears North 88 degrees 54 minutes 24 seconds East, a chord distance of 275.82', an arc distance of 277.29' to the southeast corner of Lot 8 of said Auditor's Plat, Block 7 of Ludlow Acres; thence continuing easterly, along the southerly line of said Auditor's Plat, Block 7 of Ludlow Acres, on a curve concave to the northwest, having a radius of 3456.25', a central angle of 3 degrees 24 minutes 47 seconds East, along the southerly line of said Auditor's Plat, Block 8 of Ludlow Acres, a distance of 146.87' to the southeast corner of Lot 9 of said Auditor's Plat, Block 8 of Ludlow Acres; thence South 26 degrees 14 minutes 19 seconds East, along the westerly line of a tract as recorded in Book 112 of Deeds, pages 101-102, a distance of 150.10' to the southwest corner of said tract as recorded in Book 112 of Deeds, pages 101-102; thence North 60 degrees 53 minutes 13 seconds East, along the southerly line of said tract as recorded in Book 112 of Deeds, pages 101-102 and also along the southerly line of a tract as recorded in Book 109 of Deeds, pages 197-198, a distance of 272.51' to the southeast corner of said tract as recorded in Document #192748; thence North 29 degrees 06 minutes 47 seconds East, along the westerly line of a tract as recorded in Document #192748; thence North 60 degrees 53 minutes 13 seconds East, along the southerly line of said tract as recorded in Document #192748, a distance of 192.01' to the southeast corner of said tract as recorded in Document #192748; thence South 0 degrees 32 minutes 54 seconds West, along the west line of Pleasant Avenue, a distance of 572.92' to the most northerly corner of Lot 5, Block 20, Blocks 18, 19 and 20 Ludlow Acres; thence South 51 degrees 16 minutes 56 seconds West along the northwesterly lines of said Block 20, Edkerson's First Addition, and Edkerson's Second Addition, a distance of 740.00' to the most westerly corner of Edkerson's Second Addition; thence South 38 degrees 42 minutes 47 seconds East on the southwestwesterly line of said Edkerson's Second Addition a distance of 560.04' more or less to the north right of way line of the Chicago and Northwestern Railroad Company; thence South 51 degrees 16 minutes 41 seconds West a distance of 469.55' more or less to the south line of said Section 27; thence South 36 degrees 35 minutes 33 seconds West, along the south line of said Section 27, a distance of 1156.58' to the point of beginning.

The public hearings will be held in the City Council Chambers, at City Hall, 303 Ninth St., Worthington, Minnesota, at 7:00 PM, on Tuesday, October 3, 2017. At the hearings, the Planning Commission will hear staff's reports and public testimony and may take action. All interested persons are invited to attend and be heard. Those unable to attend are invited to send written comments, prior to the hearing, to: Community Development Department, City of Worthington, P.O. Box 279, Worthington, Minnesota 56187.

Annette Fiedler, Acting Zoning Administrator, 372-8640

(September 23, 2017)

“[T]he notice involved was insufficient, ambiguous and misleading and unintelligible to the average citizen who might be affected thereby. It could confer no jurisdiction upon defendant to proceed...”. *Co. Sup. Ct. (1959)*.

# Tips for Quasi-Judicial Notice

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- Include “plain English” description of what the notice is about.
- When in doubt, don’t leave it out. While there is a balance to be struck, don’t omit important details.
- If notice is defective, start over; if notice is “questionable,” starting over is also the safer course. Consult with your entity counsel as needed.
- Make sure your notice practices are consistent with your written rules, policies and procedures. Don’t state one thing and do another.
- Recognize that proper notice is the entity’s obligation—and risk exposure—even if your rules suggest otherwise.

# Conduct of Executive Sessions

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- The OML allows executive sessions, but only for limited purposes, and strict procedures apply.
- Make sure your executive session procedures and related processes are set up to comply with the law and protect confidential information. Use a script for calling and conducting executive sessions. (CIRSA has sample scripts on its website).
- The consequences of an OML executive session violation can be severe, including the issuance of a court order that the recording of that portion of the executive session that was improper be made public. They can also include an award of fees/costs to the claimant.



# Conduct of Executive Sessions

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- Executive sessions - authorized topics commonly utilized:
  - Legal questions/advice
  - Purchase/sale of real property
  - Matters subject to negotiation
  - Personnel matters
  
- Make sure the motion/announcement to go into executive session is sufficient—must include both the specific statutory citation that authorizes the session and “identification of the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized.”
  
- See this CIRSA article: [https://www.cirsa.org/wp-content/uploads/2020/06/Liability-Alert\\_Executive-Sessions.pdf](https://www.cirsa.org/wp-content/uploads/2020/06/Liability-Alert_Executive-Sessions.pdf).

# Tips & Wrap-Up - Executive Sessions

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- Use executive sessions only when necessary; perceived “excessive use” of executive sessions can result in a lack of trust, disputes and even potential claims.
- Remain strictly on topic in executive session; participants must police themselves on this point. And remember, unless the tape has been turned off for an attorney-client discussion, the tape is on.
- In concluding any session, confirm the group’s understanding of the handling of information.
- CIRSA members have a sub-limited coverage for defense of claimed executive session violations. It applies only to claims against the governing body and does not cover claimant’s fees/costs if they win.

# First Amendment Transparency Risks

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- In addition to your entity's obligations to provide notice and openness for discussions of your goings-on, your citizens generally expect that they can participate in those discussions.
- Legally it's true that not every discussion of public business by your governing body, boards, commissions, etc. requires public participation.
- But often citizens have a legal right to be heard. Or, even if there wasn't such a right to begin with, your governing body may have created a public forum for citizen speech, and that speech is protected by the First Amendment!

# First Amendment – Public Meeting Comments

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- The general “citizen comment” period at your governing body’s meeting is illustrative.
- While not part of any required public hearing, this time you set aside to hear from citizens is a forum for free speech under the First Amendment.
- And, the First Amendment protects the free speech rights of individuals. Municipalities and their officials can be liable for retaliating against a person who’s engaging in protected speech, or for improper restrictions on speech.

# First Amendment – Public Meeting Comments

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- Thus, let your elected and appointed officials know: Don't attempt to quash citizen speech based on its content! This can be a certain path to First Amendment liability, including potential claims of personal liability.
- While there are certain, narrow exceptions—e.g., obscenity—recognize that First Amendment protections are broad. Offensive, profane or vulgar speech is protected and cannot be restrained on that basis alone.
- Sometimes citizen comments take an unexpected turn, including foul language, discourteous conduct, etc. For a lighter take, see this CIRSA video: <https://www.youtube.com/watch?v=Mfayc8Kcd5E&t=9s>, and this: <https://www.youtube.com/watch?v=RjX1IaU1A0w>.

# First Amendment – Public Meeting Comments

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•But even in these situations, remain calm and don't take the bait. The citizen's speech is likely still protected by the First Amendment. Have ready techniques for dealing with these situations:

- Consistently apply time limits.
- Don't match tone for tone. "Out-shouting" doesn't work and it's better to use "tone and temperament (TNT)" to de-escalate.
- Take a short recess if needed.

•And don't manage public comments in ways that may be perceived as unfair, retaliatory, or over-reactive.

•For more, see this CIRSA article <https://www.cirsa.org/news/handling-citizen-conflicts-at-governing-body-meetings/>.

# Conclusion

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- Furthering transparency at the municipal level may not be easy or inexpensive. But citizens now more than ever consider transparency a core service. And local governments, being close to home, are naturally given close scrutiny.
- A lack of transparency, or combative approaches in the face of heightened expectations, can exact a price, whether in loss of public trust, reputational harm, or claims and litigation.
- Honoring both the letter and the spirit of your notice requirements, and your citizens' interests in participation, will pay huge dividends in public trust, civic pride and a high-functioning organization.



## Liability Risk Management **HOTLINE**

Do you have questions about liability risks related to:

- Employee Termination and Discipline Issues
- Personnel Policies or Personnel Management
- Public Works, Parks and Rec or Police Liability
- Conducting Quasi-Judicial Proceedings
- Zoning or Land Use Liability
- Drug Testing Policies
- Marijuana – Related Issues

Call CIRSA's Liability Risk Management Hotline and Sam Light, CIRSA General Counsel, can assist. The Hotline is a free service to CIRSA Property/Casualty members to help you identify, manage and avoid potential claims, and assist with your municipal liability questions.

CONTACT THE LIABILITY RISK MANAGEMENT HOTLINE IF:

- you're considering taking an employment action that could lead to liability;
- you'd like a policy or contract document reviewed from CIRSA's liability risk management perspective;
- you'd like help identifying options for handling a potential claim situation;
- you need to get up-to-speed on a current municipal liability issue; or
- you just need to bounce an idea or issue off a neutral source.

*Please Note: At CIRSA's discretion, a courtesy contact may be made by CIRSA to the member's chief administrative officer and/or legal counsel to inform them of any Hotline inquiry. The Hotline is not a substitute for legal advice from the member's municipal attorney.*

**To make an inquiry**, or if you have questions, please contact General Counsel Sam Light at 720-605-8002 or 1-800-228-7136, or [saml@cirsa.org](mailto:saml@cirsa.org).



**Thank you for your time and your public service!**

**CIRSA Liability Hotline**

**1-800-228-7136**

<https://www.cirsa.org/wp-content/uploads/2020/04/Liability-Hotline-2020.pdf>

